IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1732 OF 1990

Forbes Forbes Campbell & Co. Ltd.
Forbes Building, Charanjitrai Marg,
Fort, Bombay-1.
..Petitioner.

Vs.

1. The Board of Trustees of the Port of Bombay.

2. M/s. Metal Fabs India Pvt. Ltd., (Petition dismissed against the Respondent No.2 vide order dated 22.7.2002.
..Respondent.

Mr. Harindeer Toor i/by M/s. Crawford Bayley & Co. for the Petitioner.

Mr. U.J. Makhija with Shri.M.N. Mulla i/by M/s. Mulla & Mulla CBC for the Respondent No.1.

CORAM : R.S. MOHITE,J.
DATED : 16/12/2005.

ORAL JUDGMENT:

1. By this writ petition, the petitioner (hereinafter referred to as "Defendant No.2") seeks to quash and set aside a judgment and decree dated 7.11.1989 passed by the full court of the Court of Small Causes, Bombay. By the impugned judgment and decree the claim of the present respondent No.1 (hereinafter referred to as "Plaintiff") made in R.C.S.Nos.2212/ 2911

of 1979 has been decreed and defendant No.2 has been directed to pay to the plaintiff a sum of Rs.4752/- with interest at the rate of 10% per annum from the date of the suit till the date of realization of the said amount. The suit of the plaintiff was decreed with costs and the defendant No.2 was directed to pay the costs throughout.

2. The brief facts of the case are as under:

a) The plaintiff is statutory body constituted under the Major Port Trust Act,1963. One M/s. Metal Fabs India Pvt. Ltd. (hereinafter referred to as "Defendant No.1") was the consignee of seven Cartons of Ball Bearings which landed in the Port of Bombay, on 5.2.1972 having been carried by a vessel "S.S. President Madison". The last free date for clearance of the said goods was 10.2.1972. The vessel "S.S. President Madison" was owned by a foreign company by name "American President Lines Ltd." The defendant No.2 was the steamers agent of the said American President Lines Ltd. As the goods remained uncleared for a period of over two months from the date of landing and the plaintiff was then unaware of the name and address of the consignee, by its letter dated 10.10.1974 addressed to defendant No.2, the plaintiff requested defendant

No.2 to furnish the name and address of the consignee. No reply was received from defendant No.2 to this letter and therefore, by a further letter dated 12.10.1974, the plaintiff served a notice of sale upon defendant No.2 with a request to issue the same to the ultimate consignee by R.P.A.D. There was no action on the part of defendant No.2, hence, the plaintiff by its notice dated 11.5.1975 again informed the second defendant that the goods were lying uncleared in the warehouse and if the same were not cleared within 10 days on payment of charges thereof, the same would be sold by public auction. In the absence of any action on the part of the defendant No.2, after making further correspondence, the plaintiff sold the goods in a public auction on 2.9.1976 and realized an amount of Rs.62,000/- as sale proceeds. The plaintiff found that after deduction of the due amount such as port charges, custom duty etc. an amount of Rs.4752/- was still due and payable to them.

b) For recovery of the aforesaid amount of Rs.4752/-, on 29.8.1979, the plaintiffs filed R.C.S.No. 2212/2911 of 1979 in the court of Small Causes at Bombay.

3. The defendant No.1 consignee never contested the

suit though served. A written statement dated 6.11.1979 was thus filed therein only on behalf of the defendant No.2. It was interalia contended in this written statement that it was not the liability of the defendant No.2 to clear the landed goods and that the second defendant was not concerned with the goods remaining uncleared as alleged. It was further contended that the plaintiff had been negligent in not auctioning the goods immediately and awaiting for 4 years before completing the sale. It was claimed that the liability to meet the claim of the plaintiff was only upon the consignee who was defendant No.1. It was contended that defendant No.2 was not the owner of the goods as alleged and that defendant No.2 was therefore, not liable to pay the deficit in the sale proceeds as claimed.

4. Both the parties led evidence at the trial and upon material produced on record, by a judgment and decree dated 8.4.1998, the trial court dismissed the plaintiff's suit against defendant No.2. The appeal filed by the plaintiffs before the full court of Court of Small Causes came to be allowed on 7.11.1989.

5. The present writ petition came to be filed by the original defendant No.2 on 2.4.1990. Rule was issued therein, but after hearing both the sides on

5.4.2004, rule came to be discharged. The defendant No.2 then carried the matter to the Apex Court and by an order dated 2.4.1996, the Apex Court granted special leave. After hearing both the sides, the Apex Court observed that both the sides had not disputed that the judgment of the Apex Court in the case of **Trustees of the Port of Madras through its Chairman Vs. M/s.K.P.V. Sheikn Mohd. Rowther & Company Pvt. Ltd and another reported in A.I.R.1995 S.C. 1922** had a bearing on the facts and question of law arising in the appeal and that when High Court had passed its order dated 18.4.1990 it did not have the assistance of this judgment. In view of this, the Apex Court set aside the order of the High Court and remanded the case for a fresh decision in accordance with law. The parties were directed to invite the attention of the High Court to the aforesaid judgment of the Supreme Court. That is how the matter is once again before this court for a fresh hearing.

6. On behalf of the defendant No.2 it was contended that defendant No.2 was not the owner of the goods which had been landed in Mumbai within the meaning of Section 2(o) of the Major Port Trust Act,1963 and therefore, he could not be liable to pay any amount due in respect of the said goods such as wharfage, demurrage, custom duty or any other dues which would accrue in respect of the

said goods. Apart from relying upon the definition of the term "owner" reliance was placed upon a judgment of the Single Judge of the Calcutta High Court in the case of **M/s. Seahorse Shipping and Shipmanagement Private Ltd. and another Vs. The Board of Trustees for the Port of Calcutta and others reported in A.I.R.1989 Calcutta 212.** The advocate for the defendant No.2 also relied upon two judgments of the Apex Court, the first being the judgment in the case of **Trustees of the Port of Madras through its Chairman Vs. M/s.K.P.V. Sheikh Mohd. Rowther and Co. Pvt. Ltd. reported in A.I.1995 S.C. 1922 and the second being the judgment in the case of The Board of Trustees of the Port of Bombay Vs. Sriyanesh Knitters reported in (1999) 7 SCC 359.**

7. On behalf of the original plaintiff, it was contended that the issue raised by defendant No.2 was no longer resintegra as by a judgment and order dated 18.12.2003, passed by the Single Judge of this court (S.R. Sathe, J.) in Suit No.2026 of 1981, it had been categorically held that Steamer agents (such as the present defendant No.2) were owners within the meaning of Section 2(o) of the Major Port Trusts Act,1963. The Single Judge in that case was considering a fact situation where a steamer agent had not issued any delivery order and it was held by the Single Judge that

such a steamer agent could be said to be an agent with "custody" in respect of the goods prior to the issuance of a delivery order. It was also held by the Single Judge that the steamer agent in that case was liable to pay demurrage charges. It is admitted before me that this issue is decided by this court by the aforesaid judgment and order dated 18/12/2003. It was however, sought to be argued that the Single Judge delivered the said judgment without considering the scheme of the Major Port Trusts Act,1963 and without referring to the relevant judgements of the Apex Court which governed the issue. Therefore, an attempt was made to persuade me to refer the matter to the larger bench if I disagreed with the judgment of the Single Judge.

8. After hearing both the sides, I am in respectful agreement with the view taken by the Single Judge of this court in Suit No.2026 of 1981. However, I propose to briefly out line in some detail, the reason as to why I choose to accept the view taken by the Single Judge and differ with the view taken by the Single Judge of the Calcutta High Court in the case of **M/s. Seahorse Shipping and Shipmanagement Pvt. Ltd. and another Vs. The Board of Trustees for the Port of Calcutta (cited supra).**

9. The definition of the term "owner" as contained in Section 2(o) of the Major Port Trusts Act,1963 is in the following terms.

> "(o) "owner", (i) in relation to goods, includes any consignor, consignee, shipper or agent for the sale, custody, loading or unloading of such goods; and (ii) in relation to any vessel or any aircraft making use of any port, includes any part owner, charterer, consignee, or mortgagee in possession thereof;"

It can be seen from the aforesaid definition that the definition is inclusive and includes any consignor or consignee, shipper or agent for the sale, custody, loading or unloading of such goods. From the above, it is clear that an agent for the sale, custody, loading or unloading of goods is a category by itself. The definition does not specify that the agent must be of a particular category of principal. Though a carrier is not specifically mentioned in the definition, a carrier would clearly be an agent of the shipper who has caused the goods to be shipped. Any agent who possessed the custody of the goods at any point of time or an agent appointed for loading or unloading of such goods would also fall within the term" owner" within the definition of the term under the Act. A single judge of this court in the judgment cited supra has held that steamer agent was a person who had the custody of the goods and was therefore, had an agent of the custody of the goods. On

this reasoning the steamer agent was held liable to pay demurrage charges which were due to the port trust.

10. On a bare reading of the definition of the word owner, it is clear that the term has a very wide import and is not restricted to person who had title over the goods in question. This can be inferred from the fact that agents who have mere custody are included in the term owner as are also agents appointed for loading or unloading the goods.

11. In so far as the judgment of the Single Judge of the Calcutta High Court in the case of **M/s. Seahorse Shipping and Shipmanagement Pvt. Ltd. and another Vs. The Board of Trustees for the Port of Calcutta and others (cited supra)** I am in respectful disagreement with the view taken by the Single Judge of the Calcutta High Court. That view proceeds upon the logic that "though a consignor, a consignee and a shipper have been specifically included in the definition of "owner", a carrier of the goods has not been so included. The reasoning was if a carrier was not included then an agent of the carrier could not be saddled with a greater responsibility and liability than his principal who would obviously be the carrier. The learned Single Judge of the Calcutta High Court also analysed the

scheme of the Act to conclude that the Act had not treated a carrier as the owner of the goods carried by the carrier and it was only the consignee or consignor and the shipper who were treated as owners under the Act. In my view, the Single Judge of the Calcutta High Court lost sight of the fact that a carrier would clearly be an agent of the shipper, entrusted with the custody of the goods by the shipper. Apart from this, in my view, the words "agent for the sale, custody, loading or unloading of such goods" by themselves constitute distinct categories of owners. If it was the intention of the legislature to restrict the term owner to agents of the consignor, consignee or shipper then it could have been so by express words to that effect or by adding the word "their" after the word "or".

12. Once it is held that steamer agent would fall within the word "owner" under Section 2(o) of the Major Port Trusts Act, it is clear that on the landing of the goods, on the request made by him the Port Trust can take charge of the goods for the purpose of performing various statutory services. Under Section 42 (2), while taking such charge, the Port Trust is obliged to give a receipt, indicating the receipt of such goods, in the prescribed proforma and after such goods have been taken charge of and receipt given for them, no liability for

any loss or damage can attach to any person to whom such a receipt has been given. Section 61 and 62 of the said Act then empower the board of the Port Trust to sell the goods in the two different situations contemplated by the said sections. For example if the rates payable to the board or any other charges, rent or any amount contemplated under Section 61 is not paid then after the expiry of two months from the time the goods have passed into its custody and in certain other situations contemplated by Section 61 goods can be sold for recovery of the due amount. Similarly, under Section 62 if the goods placed in the custody of the board are not removed by the owner or other person entitled thereto from the premises of the board, within one month from the date on which such goods were placed in their custody, the goods in question can be sold after giving notice to the owner or person entitled to remove the same and if a default is committed by not removing the said goods. It is pertinent to note that under Section 62 of the said Act, notice is also required to be served upon the owner of the vessel. Then again under Section 63 of the said Act, any amount in respect of which a ship owner has a lien under Section 60 of the Act is first required to be paid even before the dues of the port trust.

13. It is very clear from the aforesaid scheme that on the delivery of goods by the steamer agent to the Port trust and on the issuance of a receipt under Section 42(2) of the Major Port Trust Act,1963 the contract of bailment comes into existence under Section 148 of the Indian Contract Act,1872. Under Section 158 of the Indian Contract Act,1872 the bailor is duty bound to repay to the bailee the necessary expenses incurred by him for the purpose of the bailment. These expenses are interalia in the nature of wharfage or demurrage charges. In my view, it is only the steamer agent acting on behalf of the carrier who puts the goods into the custody of the Port Trust. It is the possession of such goods in their custody that gives rise to port charges. The goods in question remained in control of the steamer as the consignee or his endorsee cannot take away the said goods unless the steamer agent gives a delivery note or an endorsement on the bill of landing permitting the giving of delivery to the consignee or his endorsee. There appears to be no provision prohibiting a steamer agent from asking for the goods back at any point of time by surrendering the delivery note, subject to payment of all charges due to the port trust and other statutory authorities.

14. Both the parties have relied upon the judgment

of the Apex Court in the case of **Trustees of the Port of Madras through its Chairman n Vs. M/s. K.P.V. Sheikh Mohd. Rowther & Co. Pvt. Ltd. and another (cited supra).** On perusal of the facts of that case, it is clear that the present case can be distinguished on facts. In the case before the Apex Court, the steamer agent had in fact issued a delivery order and in such circumstances, the Apex Court held that once the goods were handed over to the Port Trust by the steamer agent and the steamer agent had duly endorsed the bill of landing or issued the delivery order, their obligation to deliver the goods personally to the owner or the endorsee came to an end. The subsequent detention of the goods by the Port Trust as a result of the intervention by the Customs authorities could not be said to be on behalf of or for the benefit of the steamer agents. In our case, the consignee failed to turn up. There was no delivery order issued by the steamer agents. Mr. Makhija fairly concedes that if it is proved that a steamer agent had duly endorsed the bill of landing for delivery or issued a delivery order, then from the date of such endorsement or issuance of the delivery order, port charges would not accrue against the steamer agent. Similarly, if in pursuance of any notice or otherwise, goods in question are removed by the steamer agent, after clearing all the

dues and after obtaining clearance as required by law then the steamer agent would thereafter not be liable to pay the charges to the Port Trust. It is clear therefore, that the steamer agent who has given delivery of goods to the Port Trust can take back the goods at any time after paying all the dues and obtaining all necessary clearances and thus, minimise the loss which may be caused by the long warehousing of the goods.

15. The judgment of the Apex Court in the case of Board of Trustees of the Port of Bombay and ors. Vs. Sriyanesh Knitters (cited supra) is also distinguishable on facts. In that case there was no steamer agent in the picture. A receipt had been issued under Section 42(2) in favour of the consignee and in the circumstances, the Apex Court held that the contract was between the Port Trust and the holder of the bill of landing which in that case was consignee. In my view, the ratio of the said case is not applicable to the facts of the present case. In a case where no endorsement permitting delivery is made on the bill of landing or no delivery note is issued by the steamer agent, the port trust will be entitled to recover the demurrage charges and other charges interalia from the steamer agent. Needless to say that, if the dues or goods are not cleared the Port Trust should act under

Section 61 or 62 of the Act as early as possible. In this view of the matter, Rule is discharged.. There shall be no order as to costs.

(R.S. MOHITE, J.)